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IN THE

Supreme Court of the United States

October term, A. D. 1936.

No. 271

In the matter of 620 CHURCH STREET BUILDING CORPORATION, a corporation, debtor under section 77B of the bankruptcy act.

620 CHURCH STREET BUILDING CORPORATION, IRENE K. GOODMAN, G. WALLER, M. LONG, A. W. KIBBY, EMIL ROSENTHAL and B. K. GOODMAN,

petitioners,

vs.

WARNER G. BAIRD, trustee of debtor, CHESTER R. DAVIS, MURRAY WOLBACH and JAMES R. McCAHEY, as members of bondholders committee for the holders of first mortgage bonds, LOUIS M. QUITMAN and EDGAR N. GREENEBAUM, as trustees under first mortgage, WILLIAM L. O'CONNELL, as receiver of Central Republic Trust Company, CLARA ABT, LUCILLE ABT, EDWARD SCHOEN and ALICE G. HIRSH,

respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Brief of the respondents Louis M. Quitman and Edgar N. Greenebaum, first mortgage trustees, in opposition to the petition for certiorari.

HENRY L. KOHN,
ISAAC E. FERGUSON,
both of Chicago, Illinois.

Attorneys for respondents Louis M. Quitman and Edgar N. Greenebaum, as first mortgage trustees.

HOMER LANDAU & CO., CHICAGO, ILLINOIS

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respondents.

No. 271.

BRIEF OF THE RESPONDENTS LOUIS M. QUITMAN AND EDGAR N. GREENEBAUM, FIRST MORTGAGE TRUSTEES, IN OPPOSITION TO THE PETITION FOR CERTIORARI.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the honorable chief justice and associate justices of the Supreme Court of the United States:

The district court found that the fair market value of the debtor's property was $245,025. (R. 15—par. 11.) The debtor's first mortgage indebtedness, at the time of confirmation of the reorganization plan, exceeded $585,832.50.*

* Principal amount $445,500; interest at 6% from January 1, 1931, $140,332.50; total $585,832.50. This does not take account of additional interest at the higher rate of 7% effective after the default of July 1, 1931, also other accrued charges under the first mortgage.

Thus the fair market value of the debtor's property was approximately 40% of the first mortgage indebtedness.

The petitioners, junior creditors and stockholders of the debtor corporation, notwithstanding the clearly valueless character of their interests in the debtor's property, complain that the circuit court of appeals abused its discretion in denying leave to appeal from the order of the district court confirming a plan of reorganization under which their claims were disposed of by appraisal.

After determining the fair value of debtor's property as aforesaid, the court—applying subparagraphs (4) and (5) of subsection (b) of section 77B of the bankruptcy act, as amended June 7, 1934*—made further findings as follows:

> "That the debtor is accordingly insolvent; that the stockholders are not entitled to participate in the plan, and that their acceptance of the plan is not a prerequisite to the confirmation of the plan." (R. 15—par. 11.)
>
> "That the court has appraised and does hereby appraise all claims allowed in class 3 (second mortgage notes) and class 4 (third mortgage note) to be of no value * * * and accordingly no securities, cash, or any

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* Subsection (b) of section 77B of the bankruptcy act, as amended June 7, 1934, provides as follows (11 USCA, section 207, subsection (b)):

> "A plan of reorganization within the meaning of this section * * * (4) shall provide in respect of each class of stockholders, of which less than a majority shall accept such plan (*unless the judge shall determine either that the debtor is insolvent*, or that the interest of such class of stockholders will not be affected adversely by the plan), adequate protection for the realization by them of the value of their equity, if any, in the property of the debtor dealt with by the plan, either, as provided in the plan,
>
> (a) by a sale of the property at not less than a fair upset price, or
>
> (b) by appraisal and payment in cash of the value either of their stock, or at the objecting stockholders' election, of the securities allotted to such stockholders under the plan, if any shall be so allotted, or
>
> (c) by such methods as will do substantial justice to such stockholders under and consistent with the circumstances of the particular case;
>
> (5) shall provide in respect of each class of creditors of which less

other thing of value shall be distributed under the plan in respect of any of the claims allowed in classes 3 and 4, and the acceptance of the plan by the holders of such claims is not a prerequisite to the confirmation of the plan." (R. 15—par. 12.)

"The court further finds that the foregoing method of treatment of the holders of claims of classes 3 and 4 provides adequate protection for the realization by the holders thereof of the value thereof under and consistent with the circumstances of the case, the same being of no value." (R. 15—par. 12.)

Thereupon, pursuant to the consent of the holders of more than two-thirds of first mortgage bonds, the court approved the plan of reorganization. Since the record presented to this court reveals neither the plan of reorganization itself, nor the proceedings of the trial court underlying its approval, the sufficiency of the evidence and regularity of the proceedings are not open to dispute.

There is much argument in the petition for certiorari on the assumption that the value of the debtor's property as found by the court was a "temporary" value, or "forced sale" value. Suffice it to say that what the trial court de-

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than two thirds in amount shall accept such plan (unless the claims of such class of creditors will not be affected by the plan, or the plan makes provision for the payment of their claims in cash in full), provide adequate protection for the realization by them of the value of their interests, claims or liens, if the property affected by such interests, claims, or liens is dealt with by the plan, either, as provided in the plan,

(a) by the transfer or sale of such property subject to such interests, claims, or liens, or by the retention of such property by the debtor subject to such interests, claims or liens, or

(b) by a sale free of such interests, claims, or liens at not less than a fair upset price and the transfer of such interests, claims, or liens to the proceeds of such sale; or

(c) by appraisal and payment either in cash of the value either of such interests, claims, or liens, or, at the objecting creditors' election, of the securities allotted to such interests, claims, or liens under the plan, if any shall be so allotted; or

(d) by such method as will in the opinion of the judge, under and consistent with the circumstances of the particular case, equitably and fairly provide such protection. * * *"

termined was the "fair market value" of the debtor's property (R. 15) and that there is no basis in the record upon which to characterize the valuation made by the court as a "temporary" or "forced sale" value, or otherwise to question its adequacy.

* * * * * * * * * * *

In opposition to the petition for certiorari, these respondents urge:

(1) No question under the constitution of the United States has been property raised or preserved by petitioners, either in the trial court, the circuit court of appeals, or this court.

(2) The decision of the circuit court of appeals is not in conflict with any decision of this court; nor in conflict with any decision of any other circuit court of appeals.

(3) The petition fails to show any other adequate reason, under rule 38 of this court, why certiorari should be granted.

(1)

No sufficiently definite constitutional question raised.

The objections filed by petitioners to the plan of reorganization are not included in the record before this court. However, in the petition for leave to appeal filed in the circuit court of appeals it is stated: "Petitioners filed objections to said plan which, in substance, were based on the fact that the said plan did not provide adequate protection for the realization by the holders of the second mortgage notes and the holders of the third mortgage note and of the holders of the capital stock of the debtor of the value

of their liens and claims against the debtor's property, and that said plan was unfair and inequitable and contrary to the constitution of the United States of America, in that said plan was repugnant to the fifth amendment to the constitution." (R. 8—par. 10.) Petitioners' assignment of errors, accompanying the petition for leave to appeal, included the following: "That the district court erred in not finding and decreeing that the said plan of reorganization is unfair, inequitable and contrary to the constitution of the United States of America, in that said plan and the order of confirmation thereof are repugnant to the fifth amendment of said constitution." (R. 20—assignment no. 16.)

Obviously, by the aforesaid assignment of error, petitioners raised no question as to the constitutional validity of section 77B of the bankruptcy act in whole or in part. Or, if the objection is that the trial court, in applying the statute, violated rights guaranteed to petitioners by the fifth amendment, nowhere is there any specification of the rights violated or the precise respect in which it is claimed that the court violated such rights.

We submit that no sufficiently definite question of deprivation of rights under the fifth amendment, either by action of congress in enacting section 77B of the bankruptcy act, or by action of the trial court in applying the statute, is presented by the petition for certiorari or the record of this case. (*Seaboard Air Line Ry. Co.* v. *Watson*, 287 U. S. 86 (headnotes 2, 3 and 4).)

(2)

No conflict with decision of this court in Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555.

In the *Radford* case the mortgagor, proceeding under subsection (s) of section 75 of the bankruptcy act, sought to stay recourse of the mortgagee against the mortgaged property for a period of five years, meanwhile to retain ownership and possession of the mortgaged property upon the sole obligation to pay the rental fixed by the court, meanwhile also to have the option to dispose entirely of first mortgage indebtedness of $9,025.09 by repurchase of the property at appraised value of $4,445.

Not to enter upon a discussion of the precise constitutional questions involved in the *Radford* case, certainly there is no analogy between the circumstances of that case and the circumstances of the present case. The interests of the petitioners in the debtor's property were clearly valueless. Petitioners contend nevertheless that, because of their non-consent to the plan of reorganization, procedure by a foreclosure sale, subject to right of redemption, became mandatory. The only question is, then, whether in the exercise of the bankruptcy power the debtor's property could be disposed of in a manner to preclude a sale subject to right of redemption.

If the debtor's property had been sold to satisfy a judgment or lien, under the laws of Illinois the petitioners or some of them might have had the right to redeem. However, bankruptcy disposition of the property is not such a sale. (*American Mining Equipment Company* v. *Illinois Coal Corporation*, 31 F. (2d) 507, 513.) Granted that petitioners' redemption rights were vested property rights under

the laws of Illinois, such property rights were subject to be divested as an incident to the exercise of bankruptcy power. (*Hanover National Bank* v. *Moyses*, 186 U. S. 181; see also *Mottley* v. *Louisville & Nashville Ry. Co.*, 211 U. S. 149.) Under the decisions of this court, it is no longer open to argument that section 77B of the bankruptcy act was not validly passed by congress in the exercise of the bankruptcy power. (*Canadian Southern Railroad Company* v. *Gebhard*, 109 U. S. 527; *Continental Illinois National Bank and Trust Company* v. *Chicago Rock Island & Pacific Ry. Co.*, 294 U. S. 648; *Meyer* v. *Kenmore Granville Hotel Company*, 80 L. ed. (Adv. Op.) 409.)

If the argument were sound that the bankruptcy court cannot divest vested rights, it would be just as applicable to the rights of non-assenting first mortgage bondholders as to the rights of junior mortgage noteholders, therefore sections 77 and 77B of the bankruptcy act would necessarily fall in their entirety.

(3)

No conflict with decisions of other circuit courts of appeal.

Although the courts have vigorously and repeatedly asserted that section 77B may not be invoked by stockholders or junior creditors merely to destroy or cut down the rights of non-assenting *prior lien creditors*, no court has as yet suggested as a converse or corollary that junior creditors and stockholders, no matter how valueless their interests in the debtor's property, must be granted participation in a reorganization under section 77B—at penalty of reversion to the procedure of a foreclosure sale, subject to rights of redemption.

The cases primarily relied on by petitioners insist upon full protection of the interest of first mortgagees, as against demands of junior claimants. (*In re Murel Holding Corporation* (CCA 2), 75 F. (2d) 941; *In re Tennessee Publishing Company* (CCA 6), 81 F. (2d) 463; *Francisco Building Corporation Limited* v. *Battson* (CCA 9), 83 F. (2d) 93.)

The decision of the circuit court of appeals for the seventh circuit in the present case does not in the least conflict with the decision of the same court in the matter of *Georgian Hotel Corporation* (CCA 7), 82 F. (2d) 917. Under the plan of reorganization adopted in that case, with the consent of 94% of the first mortgage bondholders, a portion of the capital stock of the new corporation organized to take over the assets of the debtor corporation was allocated to junior creditors and stockholders. The circuit court of appeals held that approval of this plan was fairly within the judicial discretion of the district court; that under the facts of the particular case the assenting first mortgage bondholders and the trial court might well have regarded the allotment of stock to the holders of junior claims as an equitable offset to the value of their right of redemption, assuming that the case had proceeded by foreclosure in the state court and not by reorganization in the bankruptcy court. There was no holding or intimation that it was obligatory upon the first mortgage bondholders or the trial court, regardless of the present fair market value of the debtor's property, to grant participation in the reorganization to the junior creditors and stockholders.

Conclusion.

There is no inequity to petitioners in the order of the district court, or denial by the circuit court of appeals of leave to appeal. If the estate of the insolvent debtor were ordered liquidated, it is obvious that such liquidation would yield nothing to petitioners upon their junior claims. If the reorganization proceedings were dismissed and the parties relegated to foreclosure proceedings in the state court, foreclosure sale would just as inevitably wipe out the interests of petitioners. The real complaint of the petitioners is that procedure under section 77B of the bankruptcy act makes possible the elimination of "nuisance value" which they might have had if congress, in the exercise of the bankruptcy power, had not afforded procedure other than foreclosure for adjudication and disposition of all claims against the debtor's property.

We respectfully submit that the petition for certiorari should be denied.

HENRY L. KOHN,
ISAAC E. FERGUSON,
both of Chicago, Illinois.

Attorneys for respondents Louis M. Quitman and Edgar N. Greenebaum, as first mortgage trustees.

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CHARLES ELMORE CROPLEY
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IN THE MATTER OF 620 CHURCH STREET BUILDING CORPORATION, A CORPORATION, DEBTOR UNDER SECTION 77B OF THE BANKRUPTCY ACT.

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vs.

WARNER G. BAIRD, TRUSTEE OF DEBTOR, CHESTER R. DAVIS, MURRAY WOLBACH AND JAMES R. McCAHEY, AS MEMBERS OF BONDHOLDERS COMMITTEE FOR THE HOLDERS OF FIRST MORTGAGE BONDS, LOUIS M. QUITMAN AND EDGAR N. GREENEBAUM, AS TRUSTEES UNDER FIRST MORTGAGE, WILLIAM L. O'CONNELL, AS RECEIVER OF CENTRAL REPUBLIC TRUST COMPANY, CLARA ABT, LUCILLE ABT, EDWARD SCHOEN AND ALICE G. HIRSH,
Respondents.

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SUGGESTIONS OF CHESTER R. DAVIS, ET AL., IN OPPOSITION TO THE PETITION FOR CERTIORARI.

DON KENNETH JONES,
Attorney for Respondents
Chester R. Davis, et al.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition for certiorari is improvidently presented. Rule 38, Section 1, provides that the petition "shall be accompanied by a certified transcript of the record in the

case, including the proceedings in the court to which the writ is asked to be directed". The petition at bar was not accompanied by a certified transcript of the record in the case. The only record presented is of certain proceedings had in the Circuit Court of Appeals, the court to which the writ is asked to be directed. The record of the case itself has not been filed.

It is submitted that the petition for certiorari be denied.

DON KENNETH JONES,
Attorney for Respondents
Chester R. Davis, et al.